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Nos. 366-367

In the Supreme Court of the United States

October Term, 1947

Bay [illegible] Operating Co., Inc., Petitioner

v.

James Aaron, [illegible], James Brooks, [illegible], James [illegible], [illegible] Johnson, [illegible] Roper, [illegible] and Nathaniel [illegible]bert

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Huron [illegible] Corp., Petitioner

v.

Leo B[illegible], [illegible], [illegible] Elliott, [illegible], J. Johnson, [illegible] McGee, [illegible], Alonzo B. [illegible], and [illegible]

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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In the Supreme Court of the United States

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v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS[1]

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 581–

[1] The Solicitor General is appearing for petitioners in these cases because, in accordance with wartime "cost plus" contracts entered into between the United States and petitioners,

591) is reported at 69 F. Supp. 956. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 654–659) is reported at 162 F. 2d 665.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on June 3, 1947 (R. 665–667). A petition for rehearing filed by petitioners (R. 667–670) was denied by an order of the court entered on June 24, 1947 (R. 671–672). The petition for writs of certiorari was filed on September 23, 1947, and was granted on November 10, 1947 (R. 673). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

From 1916 to date, industry-wide collective bargaining agreements covering the terms and conditions of employment in the New York longshore industry (1) have prescribed periods of specifically scheduled hours on weekdays;[2] (2) have provided that all work within such scheduled hours was to be paid for at agreed hourly rates

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the United States would ultimately have to pay such judgments as may be rendered against petitioners. During World War II, the operation of all ships was taken over by the United States, and substantially all stevedoring was performed for the account of the Government (Fdg. 23, R. 603).

[2] The scheduled hours under the 1916 agreement were 7:00 a. m. to 12:00 m. and 1:00 p. m. to 6:00 p. m. on Mondays through Saturdays, inclusive, making a 60-hour week. In 1917, the scheduled daily hours were reduced to nine, and the

(herein referred to as "straight time" rates); and (3) have provided that all work outside such scheduled hours on weekdays and all work on Sundays and holidays was to be paid for at higher hourly rates which, with minor exceptions, were one and one-half times the rates applicable to work during the scheduled hours (herein referred to as "overtime" rates). Longshoremen worked within and without the "straight time" hours in varying proportions. The issue in these cases is what were the "regular rates" at which the longshoremen were employed, within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTES INVOLVED

Section 7 (a) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, 52 Stat. 1063, 29 U. S. C. 207 (a)) provides, in part:

> No employer shall * * * employ any of his employees who is engaged in commerce * * * for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of * * * [forty hours] at a rate not less than one and one-

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workweek reduced to 54 hours. In 1918, the eight-hour day and Saturday half-holiday were achieved, making a 44-hour week. This arrangement continued (except for a period of lessened union power between 1922 and 1927, when Saturday afternoon work was resumed for all or some months of the year) until 1946, when the full Saturday holiday and a resultant 40-hour week were established (Fdg. 37, R. 610–611; Defendants' Exhibit A).

half times the regular rate at which he is employed.

Section 16 (b) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, 52 Stat. 1069, 29 U. S. C. 216 (b)) provides, in part:

> Any employer who violates the provisions of * * * section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * *

STATEMENT

These two suits were originally parts of actions brought on behalf of numerous longshoremen, named therein as plaintiffs, and "all employees and former employees of [petitioners] similarly situated," to enforce petitioners' alleged liability for overtime compensation, under Section 7 (a) of the Fair Labor Standards Act (June 25, 1938, c. 676, 52 Stat. 1063, 29 U. S. C. 207 (a)), for work performed by the plaintiffs, and others similarly situated, as longshoremen in the Port of New York during the period October 24, 1938, to October 4, 1945 (R. 6, 13). By stipulations, the representative character of the actions was terminated, the claims of the twenty respondents were severed from the actions of the other plaintiffs and consolidated for purpose of immediate trial, and the claims of the other plaintiffs were left

pending on the docket of the court, to be controlled by the "legal rules and principles established by * * * final disposition of the severed actions" (R. 2–2a, 544–549, 592–593).[3] It was also stipulated that respondents were engaged in commerce within the meaning of, and entitled to the benefits of, the Fair Labor Standards Act (R. 594).

The facts are fully set forth in the detailed findings of the trial judge. The court below accepted these findings as supported by the evidence and undisputed (R. 657).[4] These findings may be summarized as follows:

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[3] The twenty claims selected for immediate trial were chosen as presenting, in one or another of the workweeks involved, what was thought to be every possible combination of work pattern—with respect to the variety of the cargo handled, the capacity worked, and the distribution of working time between contract "straight time" and contract "overtime" periods. The work patterns of the selected claimants were not intended to be and are not representative of the longshore industry. The patterns of the industry as a whole are disclosed, not by those of respondents, but, rather, by the statistical studies prepared for and introduced by government counsel, whose accuracy has either been stipulated by counsel or found by the trial court (Fdg. 29, R. 606–608; Defendants' Exhibits D–H and J).

[4] These findings, concurred in by two courts, should, therefore, be accepted here without further examination. *Allen* v. *Trust Company*, 326 U. S. 630, 636; *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 605 (Jackson, J., concurring). The court below appended to its opinion those findings of the trial court which it deemed "pertinent." It omitted from its Appendix, however, many findings which we believe to be very pertinent. We urge the importance of the reading of the entire findings.

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During the period in suit,[5] longshoring in the Port of New York was governed by a collective bargaining agreement entered into between members of the New York Shipping Association and others, including petitioners, on the one hand, and the International Longshoremen's Association, of which respondents were members, on the other. (Fdg. 8, R. 594). This agreement established a "basic working day" of 8 hours and a "basic working week" of 44 hours, and the following wage-hour pattern for work in the port: specified hourly "straight time" rates were to be paid for "any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday;" and specified "overtime" rates (which, with minor exceptions, were one and one-half times the "straight time" rates)[6] were paid for "All other

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[5] The twenty claims here involve work performed during the period October 1, 1943, to September 30, 1945, although the complaints from which they were severed were concerned with the more extended period October 24, 1938, to October 4, 1945. It is the former, shorter period which is referred to as the "period in suit" (Fdg. 4, R. 593).

[6] The agreement provided eight separate rates for eight different classes of cargo to be handled. To each of these classes, a separate "straight time" rate and "overtime" rate were assigned. For the primary class, "general cargo," and for three other classes, the "overtime" rates were exactly one and one-half times the "straight" time rates; for the other four classes, they fell slightly short of time and one-half (Fdgs. 12, 9, R. 598, 595–597). The trial court held that these latter "overtime" rates, insofar as they were paid for work in excess of forty "straight time" hours in the week,

time, including meal hours and the Legal Holidays specified herein, [which] shall be considered overtime * * *" (Fdg. 9, R. 594–595). It was the custom in the industry also to pay the "overtime" rates for all hours worked on Saturday morning in excess of 40 "straight time" hours in any workweek (Fdg. 43 (a), R. 614) and to pay extra amounts called "heading differentials," in addition to the "straight time" and "overtime" rates, where longshoremen performed certain kinds of supervisory work (Fdg. 11, R. 597–598).[7]

Because of the uncertainties of maritime shipping and weather conditions, the unpredictable character of ship and overland cargo arrivals, and the use of the "shape" as a hiring device, employment in the longshore industry in the Port of New York is highly casual in character (Fdgs. 14–17, R. 598–600). The amount of work available depends on the number of ships in port and the length of their stay and varies from day to day,

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did not satisfy the requirements of Section 7 (a) of the Fair Labor Standards Act to the extent that they fell below time and one-half (R. 591). Petitioners do not quarrel with that ruling, and it is not in issue here.

[7] These heading differentials were added uniformly without any increase, though the supervisory work might have been performed in excess of 40 hours or during "overtime" periods (Fdg. 11, R. 598). The trial court held that failure to pay time and one-half the heading differentials for supervisory work in hours worked beyond the statutory 40-hour maximum was a violation of the Fair Labor Standards Act (R. 591). Again (cf. *supra*, note 6), petitioners do not question that ruling, and it is not in issue here.

week to week, and season to season (Fdg. 19, R. 601). The time when the work is to be done is determined by the employers (Fdg. 16, R. 599–600). With rare exceptions, longshoremen do not work regularly or continuously for any one company, but shift from employer to employer and from pier to pier, working when they want and where work is available (Fdg. 15, R. 599). At a pier where work is available, the men group themselves, normally at 7:55 a. m., 12:55 p. m., and 6:55 p. m., in a semicircle or "shape," from which the hiring stevedore selects such men as he wants (Fdg. 16, R. 599). Selection from the "shape," however, carries with it no obligation (except for certain minimum work provisions of the collective bargaining agreement) as to how long the man selected will continue at work (Fdg. 16, R. 599–600). As a result of these characteristics, there are, as to individual longshoremen, no regularity as to hours of work, as to employment by particular stevedoring companies, or as to total daily or weekly hours of employment (Fdgs. 14–19, 41, R. 598–601, 614).

Nevertheless, the longshoremen (Fdgs. 22, 27, R. 602, 604), their union (the International Longshoremen's Association) (Fdg. 27, R. 604), the stevedoring companies (Fdgs. 22, 26, R. 602, 603–604), and the steamship companies (Fdg. 25, R. 603) have all consistently sought to limit the work as much as possible to the basic working day,

that is, to the scheduled "straight time" weekday hours. The objective of the men and their union in this regard has been to achieve the normal 8-hour day, generally prevalent in the country (Fdg. 27, R. 604); of the stevedoring companies, to avoid the reduction in profit consequent upon "overtime" work (Fdg. 26, R. 603–604); and of the steamship companies, to eliminate the added cost which would aggravate the already intense competition between American ships and ships of foreign registry (Fdg. 25, R. 603). To accomplish this purpose, the men have not infrequently refused to work at night unless it was absolutely necessary to do so and, through their union, have imposed the time and one-half "overtime" rates for such extraordinary work, in order to make it so expensive that employers would avoid it except where it was impossible to do so (Fdgs. 27, 28 (c), R. 604, 605). The stevedoring companies, for their part, commonly use auxiliary equipment and the largest number of day gangs within the vessel's limitations of space and equipment in order to concentrate the work as largely as possible into the daytime hours (Fdg. 22, R. 602). The steamship companies do not permit "overtime" to be worked except with their approval (*ibid.*); and, in wartime, the permission of the Government was required (Fdg. 23, R. 603).

Higher rates have been paid in the longshore industry in New York for night work, Sunday work,

and work on Saturday afternoons and on certain legal holidays at least as far back as 1887; and from 1916, when the first agreement was made with the International Longshoremen's Association down through the period in suit, such premium rates have generally approximated one and one-half times the rates for day work (Fdgs. 30, 31, R. 608–609).[8] These 50 per cent. premiums established by the contracts have been "expressly designed to deter the penalized activity" (R. 590; see Fdgs. 28 (c), 39, R. 605, 612) and have proved to be an effective deterrent of "overtime" work, responsible for the high degree of concentration of longshore work in the Port of New York into the basic working day (R. 590; Fdg. 39, R. 612). The "overtime" premium rates are neither a "method of increasing earnings" (Fdg. 28 (c), R. 605), nor are they "shift differentials"[9] to induce work in

[8] Although, until 1938, the collective agreements did not employ the word "overtime" to describe the hours worked outside the basic working day so far as "general cargo" was concerned, that term was almost continuously so employed in the contracts so far as "bulk cargo" was concerned (Fdgs. 31, 33, 37, R. 609, 611; Defendants' Exhibit A); and apparently there is no significance in the use of the term in one connection and not in the other. Moreover, since 1918, both the union and employer representatives, during their negotiations, continually referred to such extra-basic hours as "overtime," and the award rendered by the National Adjustment Commission in 1919 labelled the hours outside of the basic working day as "overtime" (Fdg. 37, R. 611).

[9] The district court found that "overtime" rates are to be distinguished from "shift differentials", which are premium payments for work in a second or third shift where more than

unattractive hours (R. 589–590; Fdgs. 28 (d), (e), 39, R. 605–606, 612). Their efficacy as deterrents of "overtime" is borne out by port-wide statistical studies introduced into evidence by petitioners (Fdg. 29, R. 606–608; Defendants' Exhibits D. E, and J). The accuracy of the two studies made under the supervision of Professor Caleb A. Smith of Harvard University (Exhibits D and E) was stipulated by the parties; the third was found to

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one shift is worked and which are usually 5 or 10 cents an hour more than the rate for the first shift. "Shift differentials" are large enough to attract workers to work during what are regarded as less desirable hours of the day and yet are not so large as to inhibit employers from the use of multiple shifts, whereas "overtime" rates are so large that they will inhibit or discourage an employer from working his men beyond a specified number of hours or during specified hours of the day (Fdgs. 28 (d), (e), R. 605–606).

The district court found also that the historical development of the collective bargaining agreements in the longshore industry in the Port of New York has followed the prevailing pattern in organized American industry (Fdg. 39, R. 612). Prior to the Fair Labor Standards Act, the word "overtime" had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity, however, was not an indispensable element of the concept of overtime, for it was also understood to cover hours outside a specified clock pattern. The overtime rate was usually one and one-half times the "straight time" rate. Organized labor in American industry demanded penalty compensation for overtime in order to discourage work beyond a certain number of hours a week and to discourage work during specified periods of the day. It was prompted by the laborer's desire for a shorter workday and was not generally intended as a method of increasing earnings (Fdgs. 28 (a)–(c), R. 604–605).

be accurate by the trial court (R. 27–30; Fdg. 29, R. 607–608). These studies show that, outside of the war years, from 75 to 80 per cent. of the work on the New York docks has been performed during "straight time" hours; that from 73 to 86 per cent. of the work done during "overtime" periods has been performed by men continuing to work after working "straight time" hours on the same day; and that only about 4 per cent. of all work has been done by men who worked only at night.[10] During the abnormal war period, the

[10] The significance of the data disclosed by these studies is discussed in the Argument, *infra*, pp. 39–48 *passim*. In summary, the studies show the following division between "straight time" and "overtime" work in the Port of New York: During the period 1932 to 1937, of the *total man-hours worked*, 79.93 per cent. of the work was performed during "straight time" hours; 4.94 per cent. was performed on Saturday afternoons, Sundays, and holidays; and only 15.13 per cent. was performed between 5:00 p. m. and 8:00 a. m. on weekdays. In the ten-month period between October 24, 1938, the effective date of the Fair Labor Standards Act, and August 31, 1939, shortly before the outbreak of the war, 75.03 per cent. of the work was performed during "straight time" hours; 7.08 per cent. on Saturdays, Sundays, and holidays; and 17.89 per cent. between 5:00 p. m. and 8:00 a. m. on weekdays. During the last full year of war experience—namely, the last three quarters of 1944 and the first quarter of 1945—the percentages, respectively, were 54.5, 20.5, and 25.0. Of the *total overtime work* performed between 5:00 p. m. and 8:00 a. m. on weekdays during the 1932–1937 period, 86.8 per cent. was performed by men who had held over, for periods of varying length, into the evening or night hours after having worked during the day, and only 13.2 per cent. by men who had not begun work until after 5:00 p. m. During the 1938–1939 period, the percentages, respectively, were 76.71 and

proportion of "overtime" and of persons working wholly or materially during "overtime" hours increased substantially, but since the end of actual hostilities, the business in the Port of New York has largely reverted to peace-time patterns (Fdgs. 23, 24, R. 603).[11]

The employment records of the individual respondents, employed during 1943, 1944 and 1945, show that their work followed no regular pattern (Fdgs. 40 (and table), 41, R. 612–614). There were many weeks during which they were not employed by petitioners (*ibid.*). They worked varying numbers of days in different weeks, and the number of hours on the days worked varied greatly (*ibid.*). All performed substantial portions of their work during "overtime" hours, and some of them did all of their work during such hours (*ibid*). During many weeks, they worked less than 40 hours; whereas in other weeks, they worked more than 40 hours for the same employers (*ibid.*)

23.29. During the 1944–1945 period, they were, respectively, 55.5 and 44.5 per cent. Expressed in terms of percentage of *total man-hours worked* during each of the periods studied, the work done between 5:00 p. m. and 8:00 a. m. on weekdays by men who had begun work after 5:00 p. m. was 2.57, 4.17, and 11.1 per cent. in each of the three periods, respectively.

[11] During peacetime, work during "overtime" periods is more likely in the handling of passenger ships, which generally sail on fixed schedules, than it is on cargo vessels. During the war years, however, all vessels were scheduled into convoys, and a substantial amount of "overtime" work, therefore, became necessary (R. 64–66, 97, 134, 161, 163, 212).

In accordance with the general arrangements for payment of longshoremen in the Port of New York, petitioners paid respondents the contractual "straight time" hourly rates for work performed during the specified "straight time" clock hours and the contractual "overtime" hourly rates for work performed during all other weekday hours and on Sundays and holidays (plus customary differentials for work performed in special capacities), regardless of whether respondents had worked more or less than a total of 8 hours in any one day or of 40 hours during the week; the one exception being that Saturday morning work, though "straight time" under the terms of the contract, was paid for at the "overtime" rates to the extent that such Saturday work exceeded 40 "straight time" hours in the workweek (Fdgs. 42, 43 (a), R. 614).

On these findings, the district court concluded, as a matter of law, that the "straight time" hourly rates set forth in the collective bargaining agreement (plus heading differentials, when applicable) constituted the regular rates at which respondents were employed and that petitioners had complied with the requirements of Section 7 of the Fair Labor Standards Act, except in certain minor respects (R. 617).

The court below disagreed. It held that agreements other than the type involved in *Walling* v. *Belo Corp.*, 316 U. S. 624, "whether or not the result of collective bargaining, cannot, by their

terms, determine what is the 'regular rate' named in the Act" and cited, as authority for that statement, this Court's ruling in *149 Madison Avenue Corp. v. Asselta,* 331 U. S. 199. Although it accepted as correct all the findings of the trial court, it apparently regarded as "pertinent" only those set forth in the Appendix to its opinion, omitting therefrom many on which the trial court had relied, as, for example, Findings 27–29, and 37–38. Drawing inferences conflicting with those deduced by the trial judge, it determined that the regular rates in the longshore industry were not the "straight time" rates established by the collective bargaining agreement, but rather, for each longshoreman, the quotient arrived at by dividing the total pay of each longshoreman each week by the total number of hours worked by him during that week (R. 654–659). The court thereupon reversed the judgment of the trial court and remanded the case for determination of the amounts due respondents in accordance with the appellate court's opinion (R. 666).

A petition for rehearing and to shape the mandate, or, in the alternative, for a stay of mandate, filed by petitioners (R. 667–670), was denied by the court below (R. 670–671). In so ruling, the court directed that its decision remanding the suits to the district court "should be interpreted to permit the district court to consider any matters presented to it under the Portal-to-Portal

Act of 1947," which had become effective on May 14, 1947 (R. 671).

A petition for writs of certiorari to the Circuit Court of Appeals was thereupon duly filed by petitioners and granted by this Court on November 10, 1947 (R. 673).

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, under which respondents and other longshoremen were employed by petitioners during the period in suit, were the "regular rates" at which they were employed, within the meaning of Section 7 of the Fair Labor Standards Act of 1938.

2. In failing to hold that payment of one and one-half times the "straight time" rates set forth in such collective bargaining agreements for all work performed after 40 "straight time" hours in any workweek during the period in suit satisfied the requirements of Section 7 of the Fair Labor Standards Act of 1938, with respect to payment of overtime compensation.

3. In holding that the "straight time" hourly rates set forth in such collective bargaining agree-

ments were not the "regular rates," within the meaning of Section 7 of the Fair Labor Standards Act of 1938, at which respondents and other longshoremen were employed by petitioners during the period in suit, and in holding that the findings of the trial judge support that conclusion.

4. In holding that payment of one and one-half times the "straight time" rates set forth in such collective bargaining agreements for all work performed after 40 "straight time" hours in any workweek during the period in suit failed to satisfy the requirements of Section 7 of the Fair Labor Standards Act of 1938 with respect to payment of overtime compensation, and in holding that the findings of the trial judge support that conclusion.

5. In holding that rates equivalent to one and one-half times the "straight time" rates established in such collective bargaining agreements could not be excluded in computing the "regular rates" under Section 7 of the Fair Labor Standards Act unless paid for work during "hours not normally worked," and in holding that the hours between 5:00 p. m. and 8:00 a. m. on weekdays, and on Saturday afternoons, Sundays, and holidays were hours normally worked, and in holding that the findings of the trial judge support those conclusions.

6. In holding that the "regular rate" at which each of the respondents was employed by peti-

tioners during each of the weeks of his employment during the period in suit was the quotient determined by dividing the total pay of each respondent each week by the total number of hours worked by him during that week, and in holding that the findings of the trial judge support that conclusion.

SUMMARY OF ARGUMENT

I.

The letter of the collective bargaining agreement in effect during the period in suit, the intent of the parties who executed it, and the wage and hour practices prevalent on the docks all disclose that the "straight time" rates specified in the agreement were "the actual payments, exclusive of those paid for overtime, which the parties * * * agreed * * * [should] be paid during each workweek" (*Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 430), that is, that they constituted the regular rates at which respondents were employed, within the meaning of Section 7 (a) of the Fair Labor Standards Act; and that the specified time and one-half "overtime" rates constituted true, punitive overtime compensation, which the stevedoring companies were entitled to credit against their statutory obligations.

A. The wage and hour provisions of the collective bargaining agreement specified hourly

"straight time" rates payable for "any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m. Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday," and "overtime" rates—generally established at levels one and one-half their "straight time" counterparts—payable for "All other time;" the "overtime" rates were also paid for such Saturday morning work as was performed in excess of 40 "straight time" hours. The "overtime" premiums were designed not to induce work during the non-scheduled hours, but, rather, to deter the stevedoring companies from requiring such work to be done, and, thereby, to achieve a concentration of longshoring during the scheduled hours and the maximum possible measure of regularity in employment on the docks. The "overtime" premiums were, therefore, not shift differentials, and the "overtime" rates not merely regular rates for work during the non-scheduled periods; to the contrary, the "overtime" rates constituted true punitive overtime compensation.

B. This is evident not only from the letter and the intent of the collective agreement which established these "overtime" rates, but also from the fact that they inhibited overtime in the industry. Because of the premiums, there has been a marked preponderance of "straight time" hours over non-scheduled hours. While the ratio of overtime has increased during wartime, the ma-

jority of the total man-hours worked still consisted of "straight time" hours, and, in any event, the increase during wartime was a consequence of governmental policy itself. In such circumstances, the abnormal work-patterns of the war years should not be permitted to control the determination of this case. For substantially similar reasons, the employment records of the individual respondents are not controlling.

II.

The wage and hour arrangements in the longshore industry in the Port of New York during the period in suit were in full accord with the purposes and policies of the Fair Labor Standards Act and not in conflict with prior decisions of this Court.

A. Since the requirement of the collective bargaining agreement that time and one-half "overtime" rates be paid for work in the non-scheduled hours deterred the stevedoring companies from working men during such periods, it resulted in a concentration of longshoring into the scheduled "straight time" hours, a consequent reduction in the hours of work, and the employment of more men on each job. Longshoremen who were forced to work overtime were compensated for that burden by the premium pay. Thus, the purpose and policy of the Act to reduce working hours and spread employment were achieved. The fortuitous circumstance that some of the respondents worked

solely during non-scheduled hours and, consequently, might have received the same contractual "overtime" rates for work in excess of 40 hours as they had for work within 40 hours detracts nothing from the deterrent effect of the "overtime" rates. The 50 per cent. overriding penalty operated to discourage work beyond 40 hours in the week as well as to discourage work beyond the scheduled daytime periods. If the deterrent effect was insufficient to have prevented the occurrence of such situations, that was a consequence, not of the character of the rates, but rather of the situation during wartime, when the influence of all penalty premiums in curtailing excessive hours paled in the light of the urgency of total warfare.

B. The wage and hour arrangements in the industry reflected an attempt to alleviate the casual employment conditions through the medium of collective bargaining. The collective bargaining agreement in the longshore industry, as the trial court found, was "the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation" (R. 589). The decision below, nevertheless, would substitute for the judgment of the contracting parties a rule arbitrarily imposed by the court. This, we submit, would do violence to the purpose and policy of the Fair Labor Standards Act to preserve the free-

dom and integrity of collective bargaining. The inevitable consequences of the rule below would be severely to restrict the scope of collective bargaining and to check the development of agreements establishing wages and hours more favorable to employees than the minimum standards established by the Fair Labor Standards Act. And this not only in the longshore industry but in numerous other industries where collective bargaining agreements are in effect which limit working days to specifically scheduled hours aggregating work-weeks approximating the statutory maximum, by providing time and one-half overtime rates for work outside the scheduled hours.

C. The prior decisions of this Court do not require that the wage and hour arrangements in effect in the longshore industry in the Port of New York during the period in suit be set aside. The instant cases are in nowise similar, factually or in principle, to the prior cases in which this Court has rejected wage and hour plans as violative of the Fair Labor Standards Act. Though likewise dissimilar, on a factual basis, to the *Belo* case, 316 U. S. 624, and the *Halliburton* case, 331 U. S. 17, the present proceedings, we submit, are much more readily assimilable in principle to those two cases. The flexibility which Congress intended should be employed in applying the statutory mandate to the "infinite variety of complicated industrial situations" (*Kirschbaum Co. v. Walling*, 316 U. S. 517, 523), marked by em-

ployment relationships "so various and unpredictable" (*Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, 634), should not be sacrificed to the rigidity urged by respondents and imposed by the decision below.

ARGUMENT

All longshore work in the Port of New York during the period in suit, including that performed by respondents, was paid for in accordance with the provisions of the collective bargaining agreement then in effect in the industry. Specified hourly "straight time" rates were paid for "any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday," and "overtime" rates, generally established at levels one and one-half their "straight time" counterparts, were paid for all other time, including meal hours, Saturday afternoons, Sundays, and the legal holidays. The "overtime" rates were also paid for such Saturday morning work as was performed in excess of 40 "straight time" hours (Fdgs. 9, 42, 43 (a), R. 595, 614). The issue here is whether such payments satisfied the requirement of Section 7 (a) of the Fair Labor Standards Act, *supra*, p. 3, that all work in excess of 40 hours in the workweek be compensated "at a rate not less than one and one-half times the regular rate" at which respondents were employed. The "crucial questions" are whether the contractual "straight

time" rates were, in fact, the regular rates of pay, within the statutory meaning of that term, and whether the contractual "overtime" rates constituted true overtime compensation which might be credited against the statutory obligation and which was adequate payment for hours in excess of 40 in the workweek. *149 Madison Avenue Corp.* v. *Asselta,* 331 U. S. 199, 204.

Respondents urge, and the court below has held (R. 655–659), that the "straight time" rates were not, in "actual fact," the regular rates at which respondents were employed; that work cannot be classified as overtime unless performed "outside the normal or regular hours"; that in the present cases, the hours worked outside the scheduled "straight time" hours and, indeed, even those worked on Saturday afternoons, Sundays, and holidays were not outside the normal or regular working hours; therefore, that the contractual "overtime" rates were not true overtime rates; and, finally, that the regular rate at which each of respondents was employed, as that term is used in the statute, could be ascertained only by dividing the total wages paid in each workweek to each individual by the hours worked by him in that week, the resultant variable quotient in each case constituting the regular rate of employment for each of the respondents. This ruling, the court believed compelled by "the pertinent decisions of the Supreme Court" (R. 655).

On the other hand, the district court concluded, after a comprehensive trial, that the contractual "straight time" rates (plus heading differentials, where applicable) did, in fact, constitute the regular rates at which respondents were employed and that petitioners had complied with the requirements of Section 7 of the Fair Labor Standards Act (except in certain minor respects which are not here in issue, *supra*, notes 6 and 7) (R. 617). In reaching that conclusion, the trial court attributed substantial significance to the provisions of the collective bargaining agreement in the industry, because, as it found: (1) those provisions did not establish "an artificial rearrangement of pre-F. L. S. A. rates of compensation in order to avoid additional compensation payable under that Act" (R. 588); (2) on the contrary, they were "the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation" (R. 589); (3) the legitimate objectives of the contractual provisions were "Decasualization, concentration of work during daylight hours, uniformity of compensation and simplicity of calculation" (R. 588); (4) the higher contractual "overtime" rates were not "shift differentials", but, rather, true overtime rates "designed to curtail, and [which] measurably succeeded in curtailing, excessive and abnormal hours" (R. 590); (5) overtime rates are not limited to those paid for work in excess of a

stated number of straight time hours, but include, also, punitive rates applicable to work outside an agreed schedule of specific hours, within which the parties seek to concentrate their work (R. 604–605); and (6) the acceptance of respondents' contentions "would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry" (R. 586).

Petitioners respectfully submit that the trial court's ruling is the correct one and that the decision below must, therefore, be reversed and the judgments of the district court reinstated.

I

THE CONTRACTUAL "STRAIGHT TIME" RATES WERE THE REGULAR RATES AT WHICH RESPONDENTS WERE EMPLOYED, AND THE CONTRACTUAL "OVERTIME" RATES WERE TRUE PUNITIVE OVERTIME

"Regular rate" is the "keystone" of Section 7 (a) of the Fair Labor Standards Act, *supra*, p. 3, and its proper determination in cases of this character, consequently, "of prime importance." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424. Unhappily, however, and "presumably * * * because the employment relationships to which the Act would apply were so various and unpredictable" (*Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, 634), Congress, in enacting the statute, failed to include a definition

of that vital term; nor did it authorize the courts or the administrator to supply the lack. Establishment of regular rate remained, as before, the function of the particular employer and employees concerned, whose intimate knowledge of the industry apparently was deemed ample justification for the assignment; and judicial inquiry into the matter, rather than calling for any pronouncement of *a priori* principles, consequently involves merely the "responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523. As the Court has put it: "The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 137; see *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 581.

In the instant cases, the wage and hour arrangements in the industry were truly reflected in the collective bargaining agreement in effect during the period in suit. Since that agreement was plainly *bona fide* (R. 588–589; Fdg. 37, R. 610–611), it is somewhat surprising, therefore, to find the court below so lightly brushing it aside (R. 657):

> * * * the *Belo* case doctrine must be limited to agreements which contain a "provision for a guaranteed weekly wage with a stipulation of an hourly rate," and

> * * * *other types of agreement, whether or not the result of collective bargaining, cannot, by their terms, determine what is the "regular rate" named in the Act.* That "regular rate" * * * is an "actual fact." [Italics supplied.]

The fact is, of course, that regular rate is not "named in the Act;" that it must be sought and can be found only in the wage-hour patterns in the industry; and that careful inquiry into the letter of the effective collective agreement and the intent of the parties who executed it is as significant to discovery of regular rate as examination of the manner in which the agreement was put into practice.

This is not to say, of course, that contracts which do not conform with actual practice, which are wholly unrealistic and artificial, or which negate the statutory purpose are not to be rejected. Clearly, such contracts cannot prevail in the face of the statutory mandate, and the Court has so held. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419; *Walling v. Hornischfeger Corp.*, 325 U. S. 427; *Jewell Ridge Corp.* v. *Local*, 325 U. S. 161; *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 199.[12] But the mere possibility of dissonance between contracts and practice or between contracts and statute does not justify disregarding them altogether. And

[12] These cases are discussed in detailed, *infra*, pp. 61–69.

especially so, in cases such as these where, as will appear, the contractual provisions correspond fully with the realities of the employment agreement and do not clash with either the letter or purpose of the Fair Labor Standards Act.

The court below, therefore, had the clear duty carefully to consider the provisions of the collective bargaining agreement which governed longshoring in the Port of New York during the period in suit and to declare those provisions fully in keeping with the requirements of the Fair Labor Standards Act, since they established basic rates above the statutory minima, were consistent with actual practice, and were motivated by the same purposes as the statute. The court, however, failed to accord the agreement any legal significance whatsoever (R. 657).

We proceed first to a consideration of the terms of the collective agreement and, then, of the actual practices prevailing in the industry.

A. It was the intent and letter of the collective bargaining agreement that the "straight time" rates constitute the regular rates and that the "overtime" rates constitute true punitive overtime

The intent of the wage and hour provisions of the agreement is plain from the record. In light of conditions in the industry, they could have been designed for no purpose other than to achieve the quite legitimate ends of establishing a workweek restricted to the 8 daytime "straight

time" hours and of thereby achieving some measure of regularity on the docks.

We have already referred to the casualness of employment in New York longshoring, *supra*, pp. 7–8, and to the fact that the time when work tends to be done is affected by the arrival and departure of vessels and the arrival of the inland shipments destined for export. Since, however, an idle ship is a costly ship (MacElwee and Taylor, *Wharf Management, Stevedoring and Storage*, pp. 2, 3, 8), it would naturally be to the advantage of the shipping companies that the vessels' departure be speeded. This would require that cargoes be discharged and reloaded as soon as possible after arrival, and the shipping companies and the stevedoring companies, who are affiliated or under contract with them, would naturally seek, therefore, to start and complete the longshoring job at whatever hour of the day or week might meet their convenience. This economic urge, unless checked, would obviously result in working longshoremen for excessively long periods and both day and night until incoming ships are again under way. And there was a time, long ago, when a single hourly rate prevailing for both day and night work did result in a great deal of night work. Barnes, *The Longshoremen* (1915), p. 77. It was to avoid just such anarchic employment practices that the union forced the adoption of the wage and hour

arrangements of the collective bargaining agreement (*ibid.*).

Longshoremen, like other workingmen, have never relished irregular work patterns, involving substantial night, Sunday, and holiday work. Since 1916, when their union began bargaining collectively with their employers, they have, therefore, consistently endeavored to achieve some regularity and to reduce the amount of such undesirable work, by scheduling basic working days and working weeks (whose narrowing limits have reflected the flow in union strength) and by providing penalty premiums for work outside the basic hours to dissuade non-scheduled work. Even with such controls, the aberrations of the industry have precluded the regularity in employment of which workers in other industries can boast. But some measure of normalcy has been achieved, and it is clear that if such controls were absent, employment would be hopelessly chaotic.

As the trial court found: "On the evidence adduced here it cannot be doubted that the 'overtime' premiums established by I. L. A. agreement were designed to curtail, and measurably succeeded in curtailing, excessive and abnormal hours * * *" (R. 590). And, again: "The Collective Agreements, since the International Longshoremen's Association organized the longshoremen in the Port of New York in 1916, reflect the desire and purposes of the Union to decasualize

employment, to concentrate employment during basic eight-hour day and to avoid 'overtime,' except when absolutely essential * * *'" (Fdg. 37, R. 610–611).

If further confirmation is needed that the "overtime" rates provided in the New York longshore contract were intended as true punitive overtime rates,[13] it is to be found in the character of the rates themselves. Except in a few minor respects (see *supra*, notes 6 and 7), the "overtime" rates were one and one-half times the corresponding "straight time" rates. This conforms with the prevailing relationship between regular rate and overtime rate in American industry (Fdgs. 28 (b), (e), R. 605–606); the 50 percent overriding level was recognized by Congress and the courts as a true overtime mechanism to control and shorten hours,[14] even long before it was ultimately

[13] "The union method of 'enforcing' observance of the normal day upon employers is to set a higher hourly rate for hours beyond the normal than for the hours up to the normal number. The overtime rate is usually 'time and one half' (150 percent of the normal rate), with 'double time' (double the normal rate) for the days or half days not included in the normal working week. These are known as 'punitive overtime rates.' They allow the employer to work the men overtime in emergencies but impose a tax to insure that it is an emergency * * *" McCabe and Lester, *Labor and Social Organization* (1938), p. 72. See, also, to the same effect: Browne, *What's What in the Labor Movement* (1921), p. 363; Liberman, *The Collective Labor Agreement* (1939), p. 155.

[14] In 1917, the President was authorized to suspend the eight-hour law, in view of the emergency of World War I, provided "the wages of persons employed upon such contracts

graced as the appropriate differential for such purposes in the Fair Labor Standards Act itself. See *Bunting* v. *Oregon*, 243 U. S. 426, 436–437; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 578.

This quantitative relationship between the contractual "straight time" rates and the contractual "overtime" rates, in our view, is also a complete answer to respondents' contention, apparently in-

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shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one half for all hours work in excess of eight hours." (Act of March 4, 1917, c. 180, 39 Stat. 1192, 40 U. S. C. 326). In 1936, the Walsh-Healey Act (Act of June 30, 1936, secs. 1, 6, c. 881, 49 Stat. 2036, 41 U. S. C. 35, 40) prohibited work in performance of contracts over $10,000 for the manufacture of supplies in excess of eight hours in any one day, or in excess of 40 hours in any one week, except as the Secretary of Labor might grant exceptions subject to a limitation that work in excess of the permitted maximum be paid for at "not less than one and one-half times the basic hourly rate received by the employee affected"; and the Secretary authorized overtime work at not less than "one and a half times the hourly rate or piece rate received by the employee." (41 C. F. R. 201.103.) In 1911 and in 1920, Congress legislated as to customs employees so as to limit their hours of work to a normal 8-hour working day, with penalty overtime for excess hours (Act of February 13, 1911, 36 Stat. 899; Act of February 7, 1920, c. 61, 41 Stat. 402, 19 U. S. C. 267. See, also, Tariff Act of 1930, c. 497, Title IV, 46 Stat. 708, 715, 19 U. S. C. 1401, 1450, 1451; Customs Administration Act of 1938, c. 679, 52 Stat. 1077, 1082, 19 U. S. C. 1451.) Other statutes adopting the overtime technique are Act of July 24, 1919, c. 26, 41 Stat. 241, 7 U. S. C. 394 (employees of Bureau of Animal Industry); Act of March 2, 1931, c. 368, 46 Stat. 1467, 8 U. S. C. 109a (Immigration and Naturalization Service); Act of May 27, 1936, c. 463, sec. 6, 49 Stat. 1385, 46 U. S. C. 382 (b) (Inspectors of steam vessels); Act of June 19, 1934, c. 652, sec. 4, 48 Stat. 1066, 47 U. S. C. 154 (f) (2) (radio inspectors).

dulged by the court below, that the differential between the two was but a shift differential, that is, that the "overtime" rates, far from constituting true puntive overtime rates, were no more than the regular rates for night, Saturday afternoon, Sunday, and holiday work, set sufficiently higher only to induce work during such undesirable periods. The trial court's conclusion that the differential was not such a shift differential (R. 589–590) appears inescapable, in light of its findings, based on uncontradicted testimony and undisputed: (1) that a shift differential "is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts" (Fdg. 28 (e), R. 605); (2) that the "overtime" rates in these cases "were designed to curtail, and measurably succeeded in curtailing" work outside the scheduled hours on weekdays (R. 590); (3) that shift differentials are usually 5 or 10 cents per hour and seldom exceed 15 cents an hour, whereas overtime premiums are generally 50 percent of the normal rate (Fdg. 28 (e), R. 606); and in light of the testimony that shift differentials never exist except when there are regularly established shifts of fixed duration (R. 332, 334, 356), which, the record shows, was clearly not the case in the longshore industry.[15]

[15] In this respect, *Cabunac* v. *National Terminals Corporation*, 139 F. 2d 853 (C. C. A. 7), relied on by the court below

In industrial concepts, there is no such thing as a shift differential unless there are in fact regular shifts (R. 332–334, 426–428). And regular shifts were certainly not present in the New York longshore industry, except possibly in the case of some stevedoring companies during the war years, when, as will be shown, experiences on the docks were hardly characteristic of prevailing conditions in the industry. The three designated "shape"-times (see *supra*, p. 8) did not define three shifts, for they represented nothing more than three hiring times, designated for convenient assembling of the men, should work then prove to be available.

Contrast the manner in which the parties who wrote the collective agreement treated a case of true shifts when one presented itself: Under the system of collective bargaining, the negotiating committee for the union and the employers simultaneously negotiated and concluded eight different agreements for the period in suit, each dealing with different crafts. (All of these agreements are contained in the booklet of agreements effec-

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(R. 657–658), is distinguishable from the present cases. In the *Cabunac* case, the difference between the so-called "straight time" rate and the "overtime" rate was apparently only 10 cents per hour (139 F. 2d, at 854) and was actually intended as an inducement to accept employment at unattractive hours. *I. L. A. v. National Terminals Corp.*, 50 F. Supp. 26, 29 (E. D. Wisc.). Furthermore, the issue, foremost here, as to whether the differential was a true overtime penalty, was only a subsidiary question in the *Cabunac* case.

tive October 1, 1943, appearing in Defendants' Exhibit A.) One of these was the agreement here in question, affecting longshore work and designated the "General Cargo Agreement." Another was the "Port Watchmen Agreement." Unlike the services of the longshoremen covered by the General Cargo Agreement, the services of the port watchmen were regularly required around the clock. Accordingly, the parties, as they had done in previous years, set up three regular shifts for the watchmen. The same rate of pay was provided for each of the shifts without any differential whatever, but it was provided that any overtime performed after the expiration of his shift would entitle the port watchman involved to time and one-half the regular rates provided in the agreement, whether such overtime hours were in excess of 40 or not. Had the "overtime" premium for longshoremen been designed as a shift differential, there would certainly have been similarly clear designation of the shift pattern in the General Cargo Agreement.

Nor were the contractual "overtime" rates for longshore work any the less true punitive overtime rates because they happened to be applicable to work during certain clock hours without regard to whether such work had been preceded by "straight time." The expert testimony was, and the district court found, that "the idea of excessivity * * * was not an indispensable element of

the concept of overtime as understood. Overtime was also understood to cover hours outside of a specified clock pattern" (Fdg. 28 (a), R. 604–605). In industries, such as longshoring in the Port of New York, in which, as we have noted, employers might find it to their advantage to start and stop at irregular hours and in which workmen generally shift from one to another employer during the same day or week, limiting the workday merely by reference to a given maximum number of permissible hours would be ineffective as a deterrent to excessive hours. It would be possible for men to be worked greatly in excess of 8 hours per day or 40 hours per week without their securing the protective benefit of the deterrent overtime wage merely by being employed by more than one employer. In industries such as these, the only feasible method of preventing overwork and spreading employment is to establish a specific schedule of clock hours as "straight time" and to impose the overtime penalty rates for work during all other hours irrespective of excessivity.[16] Congress

[16] The prevalence in American industry of employment arrangements in which overtime is paid for work outside acceptable scheduled hours, approximating 8 per day and 40 per week, is indicated *infra*, pp. 55–60. Even in industries favored by regularity in employment, overtime rates have generally been provided not only for excessive work but for work during certain unacceptable periods as well, without regard to excessivity. Thus, many union contracts make Sundays and holidays overtime periods "as such," and the meal periods are similarly treated in some agreements. *Premium Pay Provisions in Selected Union Agreements*, 65

clearly conceived of a 50 per cent. overriding wage as a means for shortening hours of work on the assumption that it would act as a deterrent. On this assumption, a 40-hour maximum will presumably bring about a normal workweek of five 8-hour days. By the same token, the discouragement, by an overtime penalty, of work outside a normal 8-hour day will presumably result in working only a 40-hour week. The arrangements here, therefore, serve the congressional purpose.

Thus, in summary, the "overtime" rates specified in the collective bargaining agreement in effect in the longshore industry in the Port of New York during the period in suit were designed by the parties to serve as true punitive overtime rates and so to gain what measure of regularity could be achieved in view of the conditions of the longshore industry. Fixed at levels high enough to deter the stevedoring companies from working the longshoremen at other than the normal "straight time" hours, they reflected the purpose, common to the demand of all American organized labor, "to discourage work beyond a certain number of hours per week, and to discourage work during specified periods of the day" (Fdgs. 28 (c), 39, R. 605, 612). And, as the trial court found, they did, in fact, accomplish the end for which they were intended, that is, "preventing substantial amounts of overtime, except during the unusual

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Monthly Labor Review (Oct. 1947), pp. 419, 421–423, 425. See also *infra*, pp. 58–59 and note 20.

conditions existing during the war period" (R. 605).

B. The "straight time" hours, in actual fact, constituted the normal, non-overtime workweek in the industry, and the "straight time" rates, the actual rates paid exclusive of overtime

Since the "straight time" rates provided in the collective bargaining agreement in the New York longshore industry were plainly intended as the regular rates of employment and the "overtime" rates solely as a deterrent to work during the non-scheduled hours, we respectfully submit that the "straight time" rates must be held the regular rates, for statutory purposes, unless inconsistency between the provisions of the contract and the actual practice is clearly apparent. The trial court found no such inconsistency, and we submit that none exists.

Petitioners introduced into evidence in the district court a group of statistical tables (Defendants' Exhibits D, E, and J), which, so far as we know, constitute the only reliable port-wide statistical study of the work patterns prevalent in the longshore industry in the Port of New York. The accuracy of two of these tables (Defendants' Exhibits D and E) was stipulated by the parties (R. 28–30); the trial court found the third (Defendants' Exhibit J) also to be accurate (Fdg. 29 (d), R. 607–608). The study plainly demonstrates the effectiveness of the contractual

"overtime" rates on the longshoremen's working day. For, the preponderance of "straight time" hours over overtime worked on the New York docks is marked. Thus, during the years 1932 to 1937, inclusive, 79.93 per cent. of the total number of man-hours worked were within the "straight time" hours of the basic working day and week; and during the ten-month period immediately following the enactment of the Fair Labor Standards Act, that is, from November 1, 1938, to August 31, 1939, 75.03 per cent. of the total man-hours were worked during such "straight time" hours (Defendants' Exhibits D and E; Fdg. 29 (a), R. 606). Moreover, a substantial amount even of the 20–25 per cent. of man-hours which was worked during the overtime period was not in the night hours, but on Saturday afternoons and on Sundays and holidays. Thus, during the 1932–1937 period, 29.26 per cent. of the overtime was allocable to those extra days rather than to night hours; and during the 1938–1939 period, 28.35 per cent. of the overtime was so allocable (Defendants' Exhibits D and E).

It is true that with the intensification of the industrial effort and the attendant expansion of trade during the defense and war years, changes in the work patterns became evident in the direction of increases in the ratio of overtime work. But, even during the last three quarters of 1944 and the first quarter of 1945, when war industrial

activity was at or close to its peak, the majority of the total man-hours worked, 54.5 per cent., was still being worked during the "straight-time" periods (Defendants' Exhibit J; Fdg. 29 (d), R. 607). And a large portion of the overtime, too, approximately 45 per cent. of it, was Saturday afternoon, Sunday, and holiday work, rather than night work (*ibid.*). Moreover, it must be remembered that the notable increase in overtime on the New York waterfront during the war years was, in large measure, a consequence of governmental policy itself.[17] For, the fact is that the exigencies of total warfare compelled the Government to forego the program of restricting overtime, which is implicit in the Fair Labor Standards Act, and, contrariwise, to foster, if not indeed to impose a regimen of overtime work. Thus, Executive Order 9301 (8 F. R. 1825, 29 U. S. C., Supp. III, 207 note) required government contractors and, in effect, all war industries, to maintain a 48-hour minimum workweek for the duration of the war. Thereby, for the war period, the policy of the Fair Labor Standards Act to

[17] As the trial court found, "Some men, other than the [respondents], refused, even in war time, to work during the night, unless it was absolutely unavoidable. The employers found it difficult to get men to turn out for a 6:55 p. m. shape; they not infrequently did not show up at all, or flatly refused to work at night. Meetings were held by the Union's representatives with the military authorities to work out ways and means to avoid the establishment of a precedent for working around the clock" (Fdg. 27, R. 604).

curtail overtime was, in substance, suspended, and the public program was so reversed as to compel what the Act sought to prohibit as excessive hours of work. Since Congress failed to suspend the overtime provisions of the Act, workers subject to its provisions apparently continued to be entitled to time and one-half the regular rates for all hours worked in excess of 40 hours per week even during the war period; we do not mean to gainsay that. We do urge, however, that to accord consideration to the abnormal experience of the war years in ascertaining the "normal, non-overtime workweek" (*Walling* v. *Helmerich & Payne*, 323 U. S. 37, 40), and, thereby, the regular rates of employment, would be, to accord undue significance to the abnormal in determining the norm. Moreover, to do so would be to visit a fraud upon America's wartime employers. As the trial court said (R. 585–586):

> * * * in response to the war-time demand for production, the 48 hour work week became quite general. In the case of newly recruited employees in the war industries, 48 hours measured the "normal" work week throughout the term of their employment. In a sense, the 40 hour week was merely a theoretical fiction as opposed to the "real" fact of a 48 hour week. The logical extension of [respondents'] argument would require a holding that in paying such employees for the 8 hours of overtime at a rate equal to 150%

of the straight time rate, such employers had violated the F. L. S. A.; that the wages payable to such employees must now be recalculated by finding the "regular rate" to consist of the quotient of total weekly wages, divided by 48, and the overtime rate as equal to 150% thereof. Would employers, even in the exigencies of the war, have so rapidly yielded to the demands of national policy for a longer work week if they could foresee such an enlarged wage liability?

Whatever the answer to such a rhetorical question, *it is clear that the application of either of* [*respondents'*] *formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry.* (Italics supplied).

If the decision below is affirmed, myriad employers who, under government edict, lengthened their workweeks to 48 hours might now be met with gigantic claims for unpaid wages, and an excessive and unjust liability might thus be saddled on unsuspecting industry by virtue of irreconcilable government programs directed to contrary ends.[17a] For it might be urged there, as respondents

[17a] The Portal-to-Portal Act (May 14, 1947, c. 52, 61 Stat. —, 29 U. S. C. A. 251, *et seq.*) conceivably may diminish such

here urge, that the 48-hour workweek, instituted during wartime, had become the regular and normal week, that the time and one-half rates for the last 8 hours must be included in computing the regular rate, and that additional overtime compensation is owing to the millions of employees affected.[18]

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contingent liability. But the extent of the relief it may afford is not now ascertainable. Moreover, it certainly would not remove or resolve the problems posed by these cases, which are of great significance to the industries affected for the future.

[18] It is suggested that insuperable operating difficulties would ensue if the existence or non-existence of true overtime in every case were to be determined according to whether the work fell without or within hours "normally" worked, if the "normalcy" of the hours is to be determined exclusively according to some particular ratio of "straight time" to overtime for some particular period of time. To do so would invalidate *bona fide* collective bargaining agreements providing for "straight time" pay for the first 40 hours and overtime pay for work in excess of 40 hours in those industries which customarily work varying numbers of hours per week. Since occasions frequently arise for enlarging the workweek in particular plants, for varying periods, beyond the pattern which previously existed, the very indefiniteness of the word "normal" poses an insoluble operating problem as to how long and to what extent the workweek may be enlarged before the enhanced number of hours must be regarded by the employer as the "normal" or "regular" workweek, with the consequent result that the "regular rate" of pay would cease to be the "straight time" rate established by an applicable collective bargaining agreement and become a composite of the contractual "straight time" hours and the contractual overtime hours. The true test must be purpose and concordance of the arrangement and actual practice within the industry with the congressional objective.

We have quoted at some length from the district court's opinion because we believe that it affords a complete answer not only to respondents' reliance—and that of the court below—on the work patterns during the war years, but also to their reliance on the patterns of individual respondents. There is no question that the work patterns of respondents varied from those of the industry as a whole, that many of the respondents worked a substantial number of non-scheduled hours, and that some worked only during such overtime periods. But it must be remembered that all their work was performed during the war years; the first day of work involved in these suits was March 24, 1943, the last October 22, 1945 (see table opposite R. 612). Consequently, the employment records of the individual respondents reflect the normal industry patterns no more accurately than does the unbalanced wartime study in Defendants' Exhibit J; indeed, since they present but isolated instances rather than the rounded-out statistical averages of the port-wide study, their aberration is the greater. The cases in which individual longshoremen, such as some of respondents here, have been employed solely or mainly during overtime periods are exceptional cases. Even during the abnormal war years, the proportion of work performed by men who worked solely at night on the New York docks was quite small: during the 1944–1945 period studied, the

concentration of work during the basic working day was 2.4 times as great as that during the remaining 16 hours of the day (Defendants' Exhibit J; Fdg. 29 (e), R. 608). During the 1932–1937 period, it was almost eight times as great; and during the 1938–1939 period, six times as great (Defendants' Exhibits D and E; Fdg. 29 (e), R. 608). Furthermore, the work done between 5 p. m. and 8 a. m. on weekdays by men who had begun work after 5 p. m. was no more than 4.17 per cent. of the total man-hours worked during the periods prior to the outbreak of the war; and even during the war years, it did not far exceed 11 per cent. (Defendants' Exhibit D, E, and J; Fdgs. 29 (b), (d), R. 607–608).

Such atypical cases can have little significance in the face of the over-all industry patterns. If such cases are to be permitted to preclude the establishment of industry-wide wage and hour formulae, there would seem to be little possibility of achieving any measure of uniformity and regularity in any industry, and particularly such as the longshoring industry, marked, as it is, by extreme irregularities in employment opportunities. We respectfully submit that such atomization of wage and hour arrangements is not required by the Fair Labor Standards Act. Regular rate remains a real and true concept notwithstanding the existence of some small number of workers in an industry who, because of special circumstances, work preponderantly in overtime

periods. The purposes of the Fair Labor Standards Act will not be advanced by abstracting one individual pattern from the industrial context of which it is an integral part and treating it as an isolated contract without regard to the situation in the industry as a whole. Cf. *East New York Bank* v. *Hahn*, 326 U. S. 230, 232. Indeed, this Court has more than once relied on average industry figures in ascertaining the relationship of contractual rates to rates actually paid (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 425; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 429), and has had occasion to remark on the necessity of treating wage and hour situations on an industry-wide basis rather than on the basis of individual employment experiences "in a bona fide attempt to avoid complex difficulties of computation." *Jewell Ridge Corp.* v. *Local*, 325 U. S. 161, 170.

We cannot, therefore, hope to achieve any picture of a norm in any industry if we permit the abnormalities of wartime experience to color it or the aberrant employment records of individual longshoremen during the war period to blemish it. The "actual facts" must be derived from the peacetime as well as wartime patterns, and these are the facts: (1) that the "normal, non-overtime workweek" (*Walling* v. *Helmerich & Payne*, 323 U. S. 37, 40) in the longshore industry in the Port of New York was the basic workweek established by the collective bargaining agreement—8 a. m.

to 12 Noon and 1 p. m. to 5 p. m. on Mondays to Fridays, inclusive, and 8 a. m. to 12 Noon on Saturdays; (2) that the regular rates at which respondents and the other longshoremen were employed, "the actual payments, exclusive of those paid for overtime, which the parties * * * agreed * * * [should] be paid during each workweek" (*Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 430), were the "straight time" rates provided in the agreement (cf. *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 199, 204); and (3) that since the "overtime" rates were one and one-half times such regular rates and were designed to operate as a deterrent to excessive or undesirable work, they constituted true overtime compensation, which might properly be credited against the statutory obligation, and their payment to respondents for all work performed in excess of 40 "straight time" hours in the workweek constituted full compliance with the requirements of Section 7 (a) of the Fair Labor Standards Act, *supra*, p. 3.

II

THE WAGE AND HOUR ARRANGEMENTS HERE IN QUESTION ACCORD FULLY WITH THE PURPOSES AND POLICIES OF THE FAIR LABOR STANDARDS ACT AND ARE NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

The facts are, then, as we have demonstrated, that the contractual "straight time" rates were the rates actually paid for work performed during

the normal, non-overtime workweek in the longshore industry in the Port of New York during the period in suit; that that practice was, in all respects, intended by the union and the stevedoring companies and embodied in their collective agreement; that the contractual overtime rates were designed to and actually did inhibit work outside the scheduled hours; and that the "straight time" rates were, therefore, the regular rates, exclusive of overtime, at which the longshoremen, respondents among them, were employed. Such was, in effect, the ruling announced by the trial court. That ruling, we submit, is in complete accord with the purposes and policies of the Fair Labor Standards Act and not in conflict with prior decisions of this Court.

A. The wage and hour arrangements in the industry accord fully with the purpose and policy of the Act to reduce working hours and spread employment

As the Court has noted, Congress, when it provided that premium payments of time and one-half the regular rates be paid for work in excess of 40 hours, had the dual purpose "of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek * * *" *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 423–424. "* * * although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured

additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act." *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–578. Those statutory purposes were plainly achieved by the wage and hour practices here in question.

There is no need to document again the unmistakable intent of the contracting parties, when providing the time and a half contractual overtime rates for work in the non-scheduled hours, to deter the stevedoring companies from working men during such periods (see *supra*, pp. 29–39); nor the effectiveness of those provisions in concentrating the work on the New York docks during the scheduled "straight time" hours (see *supra*, pp. 39–48). Such concentration, of course, spelled a reduction in the hours of work and the employment of more men on each job. And, of course, those longshoremen who, in the event of emergency, were forced to work overtime were compensated for the burden of working during undesirable and excessive hours by time and a half pay. In every respect, therefore, the wage and hour practices in the New York longshore industry during the period in suit conformed with the stated purpose and policy of the Fair Labor Standards Act.

The "fortuitous circumstance" (as the trial court characterized it (R. 591)) that some of the respondents worked solely during the non-scheduled hours during the period in suit, and that,

consequently, they would receive the same contractual overtime rates for work in excess of 40 hours as they had earned during the first 40 hours in the week, detracts nothing from the deterrent effect of the overtime rates. The 50 per cent. overriding penalty, which successfully dissuaded the stevedoring companies from working outside the regularly scheduled hours except in emergencies, also operated to discourage work beyond 40 hours in the week. That the penalty was no greater in the latter case than in the former did not rob it of its punitive effect. Some of the deterrent quality of the rate may indeed have been lost in such circumstances, but not as a consequence of the character of the rates; rather, because such exceptional cases of exclusively overtime work were incidents of wartime, when the influence of all penalty premiums in curtailing excessive hours paled in the light of the urgencies of total warfare. The time and one-half rate device embodied in the Fair Labor Standards Act was adopted "in a period of widespread unemployment and small profits," when "the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work." *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 578. It could not have proved effective in times of great stress, such as the war years, when considerations of profit were secondary. That it did not then effect a curtailment of hours is clear from the vast amount

of overtime in all war industries, notwithstanding the accompanying time and one-half overtime obligation. See Fleming, *The Fair Labor Standards Act in the War Economy*, 9 Law and Contemporary Problems (1942), 491, 496–497. The point to be appreciated is that the rule for application of Section 7 (a) of the Act advanced by respondents and adopted by the court below, though it undoubtedly would have meant more money in the pockets of the workers, would have meant no significant curtailment of hours or spread of available work during the war years.

B. The wage and hour arrangements in the industry accord fully with the purpose and policy of the Act to preserve the freedom and integrity of collective bargaining

Congress, in enacting the Fair Labor Standards Act, did not intend to abridge the national policy, asserted only a few years earlier in the National Labor Relations Act, of establishing and preserving the freedom and prestige of collective bargaining. The Senate Committee on Education and Labor, reporting out the bill which eventually was enacted as the Fair Labor Standards Act, stated (S. Rep. No. 884, 75th Cong., 1st Sess., pp. 3–4):

> The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own

> contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.

The Committee on Labor of the House of Representatives reported (H. Rep. No. 1452, 75th Cong., 1st Sess., p. 9):

> The bill is intended to aid and not supplant the efforts of American workers to improve their own position by self-organization and collective bargaining.

As this Court has remarked, "The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 707, note 18. Congress has only recently, in the Portal-to-Portal Act of 1947 (c. 52, 61 Stat. —, 29 U. S. C. A. 251, *et seq.*) and again in the Labor-Management Relations Act, 1947 (c. 120, Title I, § 101, 61 Stat. —, 29 U. S. C. A. 151, *et seq.*), reaffirmed the public interest in encouraging and maintaining the practice and procedure of collective bargaining. In short, as the trial court said (R. 587): "* * * F. L. S. A. should not lightly override the policy of collective bargaining. F. L. S. A. establishes

minimum standards. Collective bargaining has freedom to move unhampered above the floor F. L. S. A. establishes."

In these circumstances, we respectfully submit, courts should be most reluctant to strike down provisions of collective bargaining agreements and most careful that they do so only where such provisions are clearly irreconcilable with the statutory mandate. The provisions in the longshore agreement can hardly be said to be so palpably unlawful. The decision below, therefore, in lightly brushing them aside, betrays an unjustifiable disregard for the significance of collective bargaining in the industry.[18a]

[18a] It is noteworthy that the only clue in the legislative history of the Fair Labor Standards Act to the meaning of the term "regular rate" suggests that Congress may have intended it to signify the rate agreed on by the parties. Thus, in the early stages of the Act's history, the words "agreed wage" were used as the equivalent of the term "regular rate." The bills introduced and reported out in the Senate (S. 2475, 75th Cong., 1st sess.) and that introduced in the House (H. R. 7200, 75th Cong., 1st sess.) provided that employment beyond the maximum workweek be permitted only upon payment of wages "at the rate of one and one-half times the *regular* hourly wage rate at which such employees were employed" and that reparation for violations of this overtime requirement be granted "at the rate of one and one-half times the *agreed* wage" at which the worker was employed "or the minimum wage, * * , * whichever is higher." The transition from the language "agreed wage" to "unpaid overtime compensation" in what later became Section 16 (b) of the Act is unexplained; the change appears to have been adopted in the interests of simplification; plainly, no change in congressional intent is indicated.

It must ever be kept in mind that the agreement here was a response to the troublesome casual employment conditions in the longshore industry in the Port of New York. As the trial court put it, "it is the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation" (R. 589), one of the many "complicated industrial situations" (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523) to which the Fair Labor Standards Act was addressed. To impose the rule of the court below on the industry would be to substitute the court's judgment as to what the wage and hour arrangements should be for the joint judgment of the stevedoring companies and the longshoremen, who have to live with those arrangements. As this Court has only recently said: "It was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement. *Walling* v. *Belo Corp.*, 316 U. S. 624." *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 199, 203–204. And, surely, "Decasualization, concentration of work during daylight hours, uniformity of compensation and simplicity of calculation are legitimate objectives of a collective labor agreement" (R. 588), even as much as the "desirable objective" of regularizing the weekly income which was approved in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, 635. The longshore-

men's union has, itself, stated, in this proceeding, that if the decision below is permitted to stand, the achievements it has gained by collective bargaining "would be menaced." Brief of International Longshoremen's Association in Support of Petition for Writs of Certiorari, pp. 12–13.

The district court was acutely aware of the deleterious consequences of adopting the rule advanced by respondents (R. 586):

> * * * Upon such a premise, genuine collective bargaining cannot live.
>
> * * * The inevitable consequence of such a rule would be severely to restrict the scope of collective bargaining, to check the development of agreements more favorable to employees than the minimum standards established by F. L. S. A. and to retard the use of overtime even when national interest required it.

This is evident in view of the many collective bargaining agreements now in effect which establish workweeks of less than 40 hours and the more numerous agreements which limit workdays to 8 hours. In such cases, the basic rates are provided as compensation for the stipulated hours of work, and time and one-half pay is provided for all work performed in periods outside the scheduled hours. The Bureau of Labor Statistics has reported that "Most union agreements in effect in the second half of 1946—85 percent of those studied—provided overtime pay at the rate of time and a half for all work in excess of 8

hours a day or 40 hours a week." *Premium Pay Provisions in Selected Union Agreements,* 65 Monthly Labor Review (October 1947), p. 419. Manifestly, such contracts do not provide for payment of a higher wage for the hours worked in excess of 40 hours in the week than the time and one-half rates paid for the hours worked prior thereto in excess of the 8-hour day or during other contractual overtime periods.[19] If respondents prevail here, however, and a higher wage is thus deemed required by the Fair Labor Standards Acts, these contractual provisions, so favorable to employees, may be abandoned, and the advantages which such narrowing restrictions on workdays and work-

[19] It is noteworthy that such pyramiding of overtime on overtime has been frowned upon in connection with the administration of other governmental wage programs. Thus: (1) Under the Walsh-Healey Act (41 U. S. C. 35, *et seq.*) which limits the workday on public contracts to 8 hours as well as the workweek to 40 hours, pay is calculated upon daily overtime or weekly overtime depending on which is the greater, but never on both. Rulings and Interpretations under Walsh-Healey Public Contracts Act (Revised), 2 C. C. H. Labor Law Service, par. 35442. (2) The War Overtime Pay Act of 1943 specifically provides that overtime paid under other Federal statutes "shall not also form a basis for overtime compensation under this Act" (50 U. S. C. App., Supp. V, 1407). (3) The Secretary of Labor, in interpreting Executive Order 9240 (40 U. S. C., Supp. III, 326 note), regulating overtime wage compensation during the war period, declared that it was not intended that the rule established therein of premium pay for the sixth and seventh consecutive days of work in the week should be used for the purpose of pyramiding overtime rates for a particular day. Interpretative Bulletin No. 1 of Executive Order 9240, February 17, 1943.

weeks bring to employees, in terms of shorter hours and fair recompense for work during undesirable hours, may largely be lost to them. That such advantages are substantial is eloquently illustrated by the fact that in the longshore industry in the Port of New York, 8½ times as much contractual overtime was worked and paid for as such during the 1938–1939 period as overtime which would have been paid if measured by the 40-hour weekly maximum of the Fair Labor Standards Act (Defendants' Exhibit F; Fdg. 29 (c), R. 607).

We submit that it is inconceivable that, by enacting the Fair Labor Standards Act, Congress could have intended to strike down and outlaw the numerous contracts establishing workday limitations by reference to clock-hour schedules and overtime rates for work outside such limits. The survey of the Bureau of Labor Statistics already referred to (which covered 437 union agreements in effect on July 1, 1946, in 31 industries employing slightly over two million workers), disclosed such provisions in contracts affecting workers in the following industries: Pacific Coast longshoring; alloying, rolling, and drawing of nonferrous metals; automobiles; canning and preserving; cotton textiles; men's clothing; shipbuilding; smelting and refining of nonferrous metals; and tobacco. *Premium Pay Provisions in Selected Union Agreements,* 65 Monthly Labor Review (October 1947), p. 419. Similar provisions have figured from time to time not only in con-

tracts governing those industries but also in collective agreements affecting portions of the building, printing, and upholstery and floor-covering trades, and of the electric and radio equipment, petroleum-refining, trucking, metal-mining, chemical, cotton-textile, coal by-products, and bituminous coal-mining industries.[20] To read into the Fair Labor Standards Act a condemnation of such wage-hour patterns as those here involved would, therefore, be to invalidate widespread contractual arrangements in many industries. Thus, to affirm the decision below, which would preclude clock-hour limitations on daily working hours except at the risk of having

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[20] Such wage-hour patterns are referred to in the following publications of the Bureau of Labor Statistics of the Department of Labor: *Union Wages and Hours in the Building Trades, July 1, 1946*, Bulletin No. 910, p. 17; *Union Wages and Hours in the Printing Trades, July 1, 1945*, Bulletin No. 872, pp. 13, 14; *Collective Agreements in Upholstery and Floor-Covering Trades*, Serial No. R. 654, p. 6; *Collective Bargaining by United Electrical, Radio, and Machine Workers*, Serial No. R. 779, p. 5; *Union Agreements in the Petroleum-Refining Industry in Effect in 1944*, Bulletin No. 823, p. 5; *Union Wages and Hours of Motortruck Drivers and Helpers, July 1, 1945*, Bulletin No. 874, p. 6; *Development of Collective Bargaining in Metal Mining*, Serial No. R. 817, p. 5; *Collective Bargaining in the Chemical Industry, May 1942*, Bulletin No. 716, pp. 7, 9; *Union Agreements in the Cotton Textile Industry*, Bulletin No. 885, pp. 19, 52; *Agreements of Gas, Coke, and Chemical Workers*, Serial No. R. 927, pp. 6–7. As to the bituminous coal-mining industry, see the collective bargaining agreement at R. 15–19, *United States of America* v. *United Mine Workers of America, et al.*, No. 759, O. T. 1946.

the time and one-half rates established for work in non-scheduled hours declared the regular rates for such work and thus, in turn, radically increasing the wage payable for overtime after 40 hours in the week, would affect not only the New York longshore industry but numerous other industries as well. Moreover, since the decision imposes the same restrictions with respect to limitations on Saturday and Sunday work, even more extended impact may be expected; for Saturday and Sunday work are treated as overtime "as such" and compensated at time and a half in a substantial number of organized industries. Nor may the longshore industry be dismissed as unique in the irregularity of employment opportunities there. Other industries too are marked by degrees of irregularity; otherwise there would be no need for restricting workdays to scheduled hours. And the substantial amount of night work in longshoring, which impressed the court below, is a product of the war years and was characteristic then of many other industries as well.[21]

[21] These very cases would probably not have arisen but for the abnormalities of the war years. Prior thereto, there was little work done on the New York docks for any one employer in excess of 40 hours in the week. Thus, in the ten-month period from November 1, 1938 to August 31, 1939, only 8.01 percent of these employed as longshoremen worked over 40 hours in any week and only 2.94 percent of the total number of man-hours worked was allocable to such excessive hours (Defendants' Exhibit F; Fdg. 29 (c), R. 607).

C. The wage and hour arrangements in the industry are not in conflict with prior decisions of this Court

The court below believed that it was "bound" to reverse the judgments of the trial court "by the pertinent decisions of the Supreme Court" (R. 655). The decisions which the lower court apparently had in mind are *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, and *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 199, in which wage plans were held violative of Section 7 (a) of the Fair Labor Standards Act; and *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, and *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17, in which wage plans were upheld. We respectfully submit that the court below misread these decisions, for the plan in issue in the present cases differed radically both in form and purpose from those rejected in the first group of cases,

Helmerich & Payne, supra, dealt with a so-called split-day plan. Prior to the enactment of the Fair Labor Standards Act, Helmerich & Payne's employees had worked 8-, 10-, or 12-hour shifts or tours and had been paid a fixed wage for each hour. Thereafter, in accordance with the new plan, the tour was aribitrarily split into two parts, the first four hours to be paid for at specified "base" or "regular" rates and the last four

hours, treated as "overtime," to be paid for at one and one-half times the "base" rates; the "base" rates were never to apply to more than 40 hours in any workweek. The contractual rates had admittedly been calculated to insure that the total wages for the tours worked should continue to be the same as before, and thereby to avoid the necessity of paying more for work in excess of 40 hours a week than had been paid prior to the enactment of the statute. Only in the extremely unlikely case where an employee's tours totalled more than 80 hours in a week did he become entitled to any pay in addition to the regular tour wages. The Court, noting that by the plan the "actual and regular workweek was * * * shorn of all significance" (323 U. S. at 39), struck it down as "obviously inconsistent with the statutory purpose." *Id.*, at 40. Neither of the dual objectives of Section 7 (a), said the Court, could be attained under the split-day plan: "(1) to spread employment by placing financial pressure on the employer through the overtime pay requirement * * *; (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." *Ibid.* The contractual "base" or "regular" rate was a fictitious" regular rate, "arbitrarily allocated to the first portion of each day's regular labor" (*id.*, at 41), computed "in a wholly unrealistic and artificial manner so as to negate the statutory purposes" (*id.*, at 42); it was not "the hourly

rate actually paid for the normal, non-overtime workweek. *Overnight Motor Transportation Co.*, v. *Missel* [316 U. S. 572]." *Id.*, at 40. The Court summarized the vice in the split-day plan as follows, *id.*, at 41:

> * * * The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale.

The arrangements in the New York longshore industry obviously are quite dissimilar to the split-day plan. Here, as the trial court noted, "we are dealing with a collectively bargained agreement which is the natural development of a long history" (R. 587) and which introduced no innovation, but, to the contrary, carried forward into the period in suit, a wage-hour pattern continuously in use in the industry since 1916. This was no device invented, as in *Helmerich & Payne*, to circumvent the overtime requirements of the Fair Labor Standards Act and "to perpetuate the pre-statutory wage scale." The "straight time" rates here were plain and definite; in no manner were they derived "from ingenious mathematical manipulations;" they were unmistakably the rates "actually paid for non-

overtime hours." And the "overtime" differentials were true punitive overtime premiums, which both compensated employees for excess hours worked and compelled employers to concentrate the work on the docks into the regular, daytime hours.

The piece-work guarantee wage schemes in the *Youngerman-Reynolds* and *Harnischfeger* cases were set aside for much the same reasons as impelled the rejection of the *Helmerich & Payne* plan. In *Youngerman-Reynolds*, 325 U. S. 419, 422–423, where stackers of lumber had been paid at piece rates which yielded them on the average of 51 cents an hour, new contracts provided a "basic" or "regular" rate of 35 cents per hour for the first 40 hours worked in the week and "not * * * less than one and one-half times such basic or regular rate * * *" for all hours in excess of 40, with the guaranty that the employee should receive for all regular and overtime work a sum arrived at by applying specified piece rates per thousand board feet to the actual amount of lumber stacked and which, translated to an hourly basis, amounted to approximately 59 cents per hour for both regular and overtime hours. The court found that except in extremely unlikely situations, the contractual "regular" rate was never actually paid (325 U. S., at 425), and held, therefore, that that rate was an "artificial" one (*ibid.*), an "arbitrary label" (*id.*, at 424), and not "the hourly rate actually paid for the normal, non-overtime workweek" or the basis actually

used "for calculating the compensation received for overtime labor" (*id.*, at 426). The contractual rate, said the Court, was "fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees" and established solely to enable respondents "to nullify all the purposes for which § 7 (a) was created" (*ibid.*).

Again, in the *Harnischfeger* case, 325 U. S. 427, the Court held a piece-work arrangement invalid as "a mere artifice unrelated to wage-earning actualities." 325 U. S., at 433 (Frankfurter, J., concurring). There, the contractual scheme grouped the company's workers into two classes called "incentive workers" and "non-incentive workers." The incentive workers were compensated on a piece-work basis, accompanied by a minimum hourly guaranty. Each employee was paid his "base" or "hourly" rate for all time worked, but, in addition, received, as an "incentive bonus," the difference, if any, between the base pay earned on each job and the "job price" for that job which was determined by time studies of the job. Payment of the "base" rate was guaranteed. For overtime in excess of 40 hours in the week, an additional sum equal to 50 percent of the guaranteed "base" rate was paid. The fact was, however, that about 98.5% of the incentive workers nearly always performed their jobs with sufficient speed to earn more at the piece rates than they would at their "base" or "hourly"

rates; moreover, on jobs that had not yet been "time studied," the company agreed it would pay incentive workers hourly rates at least 20 per cent. higher than the contractual "base" rates, and a similar arrangement was in effect when such workers were temporarily assigned to "non-incentive" work. Since the incentive bonuses were "a normal and regular part" of the employees' income (325 U. S., at 432), "the vast majority of the employees * * * [having received] regular though fluctuating amounts for work done during their non-overtime hours in addition to their basic hourly pay" (*id.*, at 430), the Court held that the regular rates were, in fact, higher than the base rates and that the latter lost "their significance in determining the actual rate of compensation" (*id.*, at 432).

There is, of course, no analogy between those situations and the arrangements here in question. In the longshore industry, the "straight time" rates were the only wages which were paid for work during non-overtime hours, the overtime rates were designed for truly punitive purposes, and, except for the war years, the vast preponderance of employees earned rates other than straight time rates only in extraordinary emergencies. There is, thus, no "such dubiety as to the role" of these "straight time" rates as led to the rejection of the basic piece rate as the regular rate in *Harnischfeger* (325 U. S., at 434, Frankfurter, J., concurring).

The recent decision in *149 Madison Avenue Corp.* v. *Asselta,* 331 U. S. 199, is no more pertinent to the present proceeding. There, the arrangement in question was put into effect by a contract entered into in 1942. Prior to that time, the service and maintenance employees working in the company's loft building were paid flat weekly wages for workweeks of specified length, no hourly rates being specified and no attempt being made to pay time and one-half for hours over 40 in the week. The 1942 agreement provided a 54-hour workweek for watchmen and a 46-hour week for the other regular employees, and established weekly wages, stated to include both compensation for the regular hours of employment and time and one-half for the hours in excess of 40 in the week. It was further provided that the hourly rates for those regularly employed more than 40 hours per week should be determined "by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of forty (40) hours." As a matter of practice, however, only the hours the employee was scheduled to work and the weekly wage for such scheduled workweek entered into calculation of the non-overtime hourly rate, that rate remaining constant regardless of whether an employee worked more or less than the scheduled number of hours. It was on that constant hourly rate that the premium rates were paid: 1¾ times the for-

mula rate for all hours worked by regular employees, except watchmen, in excess of 46 in the week, and two times the formula rate for all hours worked by watchmen in excess of 54 in the week. Moreover, where employees were absent for excusable causes, the agreement provided that six of the hours worked by them should be compensated as overtime regardless of whether the total of hours actually worked in the week exceeded 40; whereas non-excusable absentees were paid a sum obtained by multiplying the number of hours actually worked times the formula rate, being given credit for overtime only in case the number of hours actually worked exceeded 40. Again, part-time workers employed for less than the scheduled workweek were hired at a specified schedule of hourly rates obtained by dividing the weekly wage paid the regular employees by the number of hours in the regular workweek, despite the fact that according to the terms of the formula the weekly wage included both regular and overtime pay. After considering the terms of the agreement and the operation of the plan in actual practice, the Court held that the contract formula rate was not the regular rate of pay because no use whatsoever was made of the formula rate in determining the wages for part-time workers and there was no consistent application of the formula rate even as to regular employees. 331 U. S., at 202, 204–205, 208.

Certainly, this most recent decision on the issue of regular rate, involving complicated wage formulae, is wholly irrelevant to the present suits. The contractual "straight-time" rates here were, without question, actually and consistently paid to all longshoremen for work during the scheduled basic working days and working weeks (except so far as Saturday morning work might exceed 40 "straight time" hours, when the overtime rates were paid), and the overtime rates were uniformly paid for work during all non-scheduled hours.

The instant cases are, then, in no wise related to *Helmerich & Payne, Youngerman-Reynolds, Harnischfeger,* and *Asselta.* Though equally dissimilar, so far as the wage plans are concerned, to the *Belo* case, 316 U. S. 624, and the *Halliburton* case, 331 U. S. 17, we submit that they are much more readily assimilable, in principle, to these two latter cases than to the first group."[22] Here, as in *Belo* and *Halliburton,* the trial court found that the wage contract was *bona fide* and that it was intended to and did really fix the regular rates at which the longshoremen were employed (331 U. S., at 20); again, the contract

[22] As the court below remarked (R. 657), the trial court "relied on *Walling* v. *Belo Corp.*, 316 U. S. 624." To the extent that that case is applicable, such reliance can hardly be questioned. The trial court's opinion, however, clearly demonstrates that its judgment is not grounded blindly on that case but rather on a careful consideration of all pertinent facts and decisions.

here, too, specified "a basic hourly rate of pay and not less than time and one-half that rate for every hour of overtime work beyond the maximum hours fixed by the Act" (316 U. S., at 634); the contract was not an attempt to evade the overtime requirements of the Act but rather an effort to achieve the "desirable objective" of some regularization of an employment situation where the employees "have no usual workweek" and "the work hours fluctuate from week to week and from day to day" (316 U. S., at 635; 331 U. S., at 21); and the contract here, as there, "carries out the intention of the Congress" (316 U. S., at 634).[23]

In the present proceedings, as in *Belo* and *Halliburton*, the flexibility which Congress intended should be employed in applying the statutory mandate to the "infinite variety of compli-

[23] The intimation of the court below that the use of the term "overtime" to designate the non-scheduled periods and the rates payable for work during such periods was an innovation in the longshore industry contract of 1938 (R. 655–656) and, thus, indicative of an effort to evade the statutory mandate, is, as we have already noted (*supra*, note 8), wholly unwarranted. The term "overtime" had almost continuously been employed in the collective agreements, long prior to 1938, to denote longshore work during non-scheduled hours on "bulk cargo," including ballast and all coal cargoes (Defendants' Exhibit A). Its omission in references to work on "general cargo" is apparently of no significance. Moreover, since 1918, both the union and employer representatives, during their negotiations continually spoke of the non-scheduled hours as "overtime," and the award rendered by the National Adjustment Commission in 1919 so labeled them (R. 611).

cated industrial situations" (*Kirschbaum Co.* v. *Walling*, 316 U. S. at 523), marked by employment relationships "so various and unpredictable" (*Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, 634), should not be sacrificed to the Procrustean rigidity urged by respondents and imposed by the decision below.[24]

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[24] There are several decisions in the lower courts which are to the same effect as or to some degree in agreement with the decision below. We submit that such decisions, to the extent they are in accord, are erroneous. *Ferrer* v. *Waterman Steamship Co.*, 70 F. Supp. 1 (D. C. Puerto Rico), involved longshore agreements governing the industry in Puerto Rico and reaches the same conclusion as the decision below. *Roland Electrical Co.* v. *Black*, 163 F. 2d 417 (C. C. A. 4), pending on petition for certiorari on another issue, *sub nom. Black* v. *Roland Electrical Co.*, No. 340, so far as pertinent, held merely that "payments in excess of the amount required by the statute to an employee for work done in certain weeks do not relieve the employer from the obligation to compensate the employee for deficiencies in other weeks" (163 F. 2d., at 420); its conclusion that the time and one-half higher rate maintained for certain irregular periods of work did not constitute overtime compensation under the Fair Labor Standards Act, but rather the "regular rate" for the periods to which it applied, relying on the ruling below (*id.*, at 421, 422–423), seems to us *obiter* and unnecessary to the decision of the court; moreover, the higher rates in that suit, unlike those in the instant cases, "*were not made or intended to be made as compensation for overtime work* within the contemplation of the Act" (*id.*, at 421, italics supplied). *Cabunac* v. *National Terminals Corporation*, 139 F. 2d 853 (C. C. A. 7), as already noted (*supra*, note 15), is distinguishable from the present suits on the ground that a shift differential of 10 cents rather than a punitive overtime rate was involved there; furthermore, the issue here mooted was only a subsidiary question in *Cabunac*.

CONCLUSION

It is respectfully submitted that, for the reasons set forth above, the ruling of the court below should be reversed and the judgments of the trial court reinstated.

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